Supreme Court, U. S.
FILED
OCT 27 1976
MICHAEL RODAK, JR., CLERK

No. 76-113

In the Supreme Court of the United States

OCTOBER TERM, 1976

VIOLET JOSEPHINE FELDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

WILLIAM G. OTIS,
ROBERT J. ERICKSON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-9) is reported at 535 F. 2d 1175.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1976. A petition for rehearing and suggestion for rehearing *en banc* was denied on June 23, 1976 (Pet. App. A-10 to A-11). The petition for a writ of certiorari was not filed until July 26, 1976, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED[1]

1. Whether the application for electronic surveillance sufficiently showed the inadequacy of other investigative procedures.

2. Whether the application for the order was properly authorized.

3. Whether telephone conversations intercepted pursuant to court order should have been excluded from evidence because a California statute requires the consent of both parties before telephone conversations may be monitored.

STATEMENT

Following a non-jury trial in the United States District Court for the Central District of California, petitioner was convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955. She was sentenced to four years' imprisonment, with all but ten days of the term suspended in favor of five years' probation. She was also ordered to contribute 150 hours of work to charity for three years (Pet. App. A-12). The court of appeals affirmed (Pet. App. A-1 to A-9).

In orders dated November 13 and 30, 1973, a district judge authorized the wire interception of the conversations of a sports betting group headed by Samuel Farkas. The government's evidence at trial consisted primarily of tape recordings of conversations intercepted under the court's

[1]Although petitioner states that this case warrants review of all nine grounds urged on appeal (Pet. 4), she makes no argument on any of those issues and presents only the three we have identified as questions. Accordingly, we discuss only those three (see Rule 23(1)(c) of the Rules of this Court); in any event, petitioner's remaining claims were properly answered in the opinion of the court of appeals.

order, gambling records seized pursuant to a search warrant, the testimony of a witness expert in gambling activities, and the testimony of an accomplice who had been granted immunity. This evidence showed that petitioner was a principal agent for Farkas; her job was to relay bets to the appropriate front office clerk (Pet. App. A-2).

ARGUMENT

1. Petitioner asserts that the affidavit in support of the government's application for an order authorizing electronic interception failed to show that "other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," as required by 18 U.S.C. 2518(1)(c).

We have recently discussed the requirements of Section 2518(1)(c) in our memorandum in opposition to certiorari in *Steinberg* v. *United States*, No. 75-1040, certiorari denied, May 19, 1976; and our briefs in opposition in *Pezzino* v. *United States*, No. 75-6651, and *Anderson* v. *United States*, No. 75-500, petitions for writs of certiorari pending; *Green* v. *United States*, No. 75-962, certiorari denied, April 26, 1976, and *Lawson* v. *United States*, No. 75-659, certiorari denied, 424 U.S. 927.[2] We there noted that the requirements of Section 2518(1)(c) are satisfied when the affidavit, read in a practical and commonsense fashion (see S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1968)), shows sufficient factual basis from which the issuing authority can reasonably conclude that electronic surveillance is necessary to obtain evidence for the successful prosecution of persons known to be involved in the activities under investigation, or is necessary to ascertain

[2]We are sending petitioner's counsel copies of our filings in those cases.

the full scope of their activities and identify the participants. See *United States* v. *Turner*, 528 F. 2d 143, 152 (C.A. 9), certiorari denied *sub nom. Grimes* v. *United States*, 423 U.S. 996.

The court below correctly found that the affidavit of Agent Charles Walker provided such a factual basis. The affidavit related that six informants had provided information concerning Farkas's illicit gambling activities (Aff. 5-11, 16-19),[3] but that each of the informants had "stated that even if immunized and given protective custody [he] would be unwilling to testify at any proceeding for fear for [his] safety" (Aff. 23). Agent Walker further swore that thorough consideration had been given to infiltrating the gambling operation or conducting a physical search, but that these possibilities had been rejected because, under the circumstances, they were not feasible (Aff. 23-24).

This conclusion is amply supported by Walker's affidavit. A confidential informant revealed that Farkas "ha[d] become extremely secretive * * * in order to avoid the police" and used a bookmaking agent "to contact his bookmaking employees and to direct his bookmaking operation" (Aff. 8). Another informant reported that Farkas's "back office" was not using any fixed office locations for running his gambling activities (Aff. 6-7). Furthermore, extensive physical surveillance disclosed that the group utilized a pay telephone located in a small neighborhood market for most of its gambling activities (Aff. 11-16, 23). Because of the telephone's location in the store, it was not possible to observe it from the outside, and constant surveillance inside the market could have

[3]"Aff." refers to the November 13, 1973, affidavit of Agent Walker in support of the government's application for a wire intercept order, a copy of which we are lodging with the Clerk of this Court.

been readily detected (Aff. 16). Although agents were able occasionally to overhear gambling-related conversations being conducted over the telephone (Aff. 14-15), this surveillance was not sufficient to disclose the full extent of the gambling activity and the identities of other participants therein.[4]

On the basis of this affidavit, the court of appeals correctly found that there had been (Pet. App. A-5)—

> a conscientious effort on the part of the F.B.I. to employ "other investigative procedures" where possible. Only after these alternatives failed to produce sufficient evidence to take to trial and other methods were discarded as reasonably "unlikely to succeed if tried," was the warrant authorizing electronic surveillance sought.

Further review of this essentially factual determination is unwarranted.[5]

[4]The telephone company did not maintain permanent records of the originating or terminating numbers of calls made from the pay telephone involving a charge of less than 30 cents (Aff. 16). Thus, without electronic surveillance it would not have been possible to discover the identity of the party receiving the calls.

[5]As we have noted (see briefs cited *supra*, p. 3) a panel of the Ninth Circuit, in *United States* v. *Kalustian*, 529 F. 2d 585, appears to have interpreted Section 2518(1)(c) to require greater specificity in the supporting affidavits than have other panels of the Ninth Circuit or panels of other circuits. The Ninth Circuit has to date refused to resolve this conflict. Since no other court of appeals has followed *Kalustian*, and future affidavits can be drafted to conform to the stringent *Kalustian* standards, we have concluded that it is not necessary to ask this Court to review the decisions in which various panels of the Ninth Circuit have suppressed evidence on the authority of *Kalustian*. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902. In any event, petitioner does not challenge the conclusion of the court below (Pet. App. A-9) that "*Kalustian* should be distinguished on the ground that the affidavits in *Kalustian* contained less particularity than the affidavits in the case at bar." Accordingly, this case does not directly present the *Kalustian* issue.

2. Petitioner also contends, without supporting argument, that the application for an intercept order was not authorized as required by 18 U.S.C. 2516.[6] That contention was properly rejected by the court of appeals, upon whose opinion we rely (Pet. App. A-8):

> Defendants do not challenge the authority of Assistant Attorney General Peterson to approve the application for wiretaps. They contend that the authorizations were defective because there is no showing that he arrived at his decisions only after careful evaluation and screening of the applications, in contravention of Supreme Court language that "The mature judgment of a particular, responsible Department of Justice official is interposed as a critical precondition to any judicial order." *United States* v. *Giordano*, 416 U.S. 505, 515-516 (1974).
>
> The question raised has been settled in the Ninth Circuit in *United States* v. *Turner* [528 F. 2d at 151]. ". . . the basis on which, or method by which he [the proper authorizing official] gave the authorization is not, in our judgment, subject to review for compliance with §2516(1). Rather it is to be presumed that the official has properly exercised the judgment called for by the statute when he affixed his signature to an order authorizing an application."

3. Finally, petitioner raises the question whether her intercepted conversations were privileged under 18 U.S.C.

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[6] 18 U.S.C. 2516(1) provides: "[A]ny Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for * * * an order authorizing * * * the interception of wire or oral communications * * *."

2517(4)[7] and should have been suppressed because California law forbids the unconsented monitoring of wire communications. See Cal. Penal Code §631 (West 1970).

The legislative history of Section 2517(4) demonstrates that the privileges referred to are those based on the relationship of the parties to the conversation, such as lawyer-client and husband-wife. "The scope and existence of these privileges varies from jurisdiction to jurisdiction. [Section 2517(4)] is intended to vary the existing law only to the extent it provides that an otherwise privileged communication does not lose its privileged character because it is intercepted by a stranger." S. Rep. No. 1097, 90th Cong., 2d Sess. 100 (1968). Thus, it is clear that Section 2517(4) refers to conversations that are "privileged other than by virtue of their character as private telephone conversations." *United States* v. *Turner, supra,* 528 F. 2d at 155; *United States* v. *Kerrigan,* 514 F. 2d 35, 37 n. 5 (C.A. 9). The privilege the California statute creates, however, is designed to protect the confidentiality of private telephone conversations as such.

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[7] 18 U.S.C. 2517(4) provides: "No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character."

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

WILLIAM G. OTIS,
ROBERT J. ERICKSON,
Attorneys.

OCTOBER 1976.

DOJ-1976-10